

This Opinion is not a
Precedent of the TTAB

Mailed: September 29, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re BFY, LLC

Serial No. 88090409

Erik M. Pelton of Erik M. Pelton & Associates PLLC
for BFY, LLC

Erin Z. Dyer, Trademark Examining Attorney, Law Office 130,
John Lincoski, Managing Attorney.

Before Mermelstein, Wellington, and Heasley
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

BFY, LLC (“Applicant”) seeks registration on the Principal Register of the mark ALLERGEEZ (in standard characters) for “homeopathic pharmaceuticals for use in the treatment of allergy symptoms; medicated candies for the treatment of allergy symptoms,” in International Class 5.¹

¹ Application Serial No. 88090409 was filed on August 23, 2018, based on a declared intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Page references to the application record are to the downloadable .pdf version of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs and other entries on appeal are to the Board’s TTABVUE docket system.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground of mere descriptiveness.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal proceeded. We affirm the refusal to register.

I. Discussion

A. Mere Descriptiveness

In the absence of acquired distinctiveness, Section 2(e)(1) of the Trademark Act precludes registration of a mark on the Principal Register that, when used in connection with the applicant's goods, is merely descriptive of them. 15 U.S.C. § 1052(e)(1). "A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services." *In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1598 (TTAB 2018) (citing *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015); *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978)). Applicant and the Examining Attorney are essentially in agreement on this point.²

² Applicant's brief, 10 TTABVUE 9; Examining Attorney's brief, 12 TTABVUE 4.

B. Novel, Intentional Misspelling

The Examining Attorney maintains that ALLERGEEZ “is merely a novel or intentional misspelling of the word ‘ALLERGIES,’ which is highly descriptive as used in the context of applicant’s goods.”³ The terms ALLERGEEZ and ALLERGIES are phonetic equivalents, she points out, adducing evidence that the suffixes “GEEZ” and “GIES” would be pronounced the same.⁴ For example, according to Dictionary.com, “allergy” is pronounced “al-er-jee.”⁵ According to Stedman’s Medical Dictionary, “allergy” is pronounced “ăl’ ər-jē.”⁶ Given that Applicant’s applied-for mark is the phonetic equivalent of “ALLERGIES,” she concludes, it is merely descriptive of a feature and purpose of its identified goods: pharmaceuticals and medicated candies for the treatment of allergy symptoms.⁷ *See In re Chamber of Commerce*, 102 USPQ2d at 1219.

We agree that a novel spelling does not overcome evidence of mere descriptiveness if purchasers would perceive the different spelling as the equivalent of the descriptive term. *See, e.g., Nupla Corp. v. IXL Mfg. Co.*, 114 F.3d 191, 42 USPQ2d 1711, 1716 (Fed. Cir. 1997) (CUSH-N-GRIP “which is merely a misspelling of CUSHION-GRIP, is also generic as a matter of law”); *King-Kup Candies, Inc. v. King Candy Co.*, 288 F.2d 944, 129 USPQ 272, 273 (CCPA 1961) (“the syllable ‘Kup,’ which is the full

³ Examining Attorney’s brief, 12 TTABVUE 5-6, 10.

⁴ Examining Attorney’s brief, 12, TTABVUE 6-8. *See, e.g.*, Dec. 10, 2018 Office Action at TSDR 6-19; Jan. 23, 2020 Office Action at 30-39, 48-50.

⁵ Dictionary.com, Jan. 23, 2020 Office Action at 50.

⁶ American Heritage STEDMAN’S MEDICAL DICTIONARY, June 29, 2019 Office Action at 53.

⁷ Examining Attorney’s brief, 12 TTABVUE 5.

equivalent of the word ‘cup,’ is descriptive”); *In re Hercules Fasteners, Inc.*, 203 F.2d 753, 97 USPQ 355, 358 (CCPA 1953) (finding “Fastie” merely a phonetic spelling of “fast tie” is descriptive); *Andrew J. McFarland, Inc. v. Montgomery Ward & Co.*, 164 F.2d 603, 76 USPQ 97, 99 (CCPA 1947) (KWIXTART merely descriptive for electric storage batteries); *In re Calphalon Corp.*, 122 USPQ2d 1153, 1164 (TTAB 2017) (finding SHARPIN phonetically identical to “sharpen,” describing knife-sharpening goods); *Nazon v. Ghiorse*, 119 USPQ2d 1178, 1185 (TTAB 2016) (“one cannot obtain rights in a mark merely by a slight misspelling of a recognized descriptive term”); *see generally* 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:31 (5th ed. Sept. 2020 update) (“A slight misspelling of a word will not usually turn a descriptive word into a non-descriptive one.”).

The policy underlying the general rule that misspelled words may be merely descriptive is set forth in the Restatement of Unfair Competition as follows:

The misspelling or corruption of an otherwise descriptive word will not ordinarily alter the descriptive character of the designation. In many instances the contrivance will not overcome the ordinary meaning of the term, and prospective purchasers will thus continue to understand the designation in a purely descriptive sense. Indeed, in some instances the alteration may go entirely unnoticed by a significant number of consumers. If the altered form is phonetically equivalent to the original word, its aural significance will also remain merely descriptive.

RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 14, cmt. a. (June 2020 update).

Applicant does not dispute that ALLERGEEZ is the phonetic equivalent of “ALLERGIES.”⁸ It admits that consumers can interpret ALLERGEEZ as “a mere

⁸ Applicant’s brief, 10 TTABVUE 18.

alternative spelling of the word ‘ALLERGIES’....”⁹ Indeed, “Applicant does not dispute that this meaning, if it stood alone, would be merely descriptive of the relevant goods.”¹⁰

Applicant contends, however, that its applied-for mark “is a creative double entendre that has multiple interpretations, which are readily apparent to the potential consumer, and thus ALLERGEEZ is not merely descriptive of Applicant’s medicated candies.”¹¹ We address that contention next.

C. Double Entendre

Applicant contends that “a registrable mark can have two (or more) meanings, one of which can be descriptive and the other suggestive.”¹² In this case, it argues, “ALLERGEEZ has an alternative meaning that would be readily perceived by consumers as a double entendre on the phrase ‘ALLERGY EASE.’”¹³ “[A]pplicant

⁹ Applicant’s reply brief, 13 TTABVUE 6.

¹⁰ June 10, 2019 Response to Office Action at 7. Applicant offered to disclaim the exclusive right to use the word “ALLERGIES” apart from the mark as shown. But the Examining Attorney declined to accept the offered disclaimer, as it would be tantamount to disclaiming the entire mark. We agree that a disclaimer would be ineffective. Consumers are unaware of disclaimers reposing on the Principal Register. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“The public is unaware of what words have been disclaimed during prosecution of the trademark application at the PTO.”). And the disclaimer would not overcome its phonetic equivalence with “ALLERGIES.” We further note that “disclaimer of a term is an admission of the merely descriptive nature of that term, as applied to the goods or services in connection with which it is registered.” *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1442 (TTAB 2005). *See also Quaker State Oil Ref. Corp. v. Quaker Oil Corp.*, 453 F.2d 1296, 172 USPQ 361, 363 (CCPA 1972) (“when it disclaimed said term in applications for registrations of compound marks, it again admitted the merely descriptive nature of the mark and acknowledged that it did not have an exclusive right therein at that time.”).

¹¹ Applicant’s brief, 10 TTABVUE 10.

¹² Applicant’s brief, 10 TTABVUE 20.

¹³ Applicant’s reply brief, 13 TTABVUE 7.

submits that the suffix ‘-EEZ’”, “playfully and uniquely connotes that its goods are intended to relieve a child’s allergies so that the child does not experience severe allergic reactions.”¹⁴

We agree with the Examining Attorney, though, that this does not constitute a double entendre. For trademark purposes, a ‘double entendre’ is an expression that has a double connotation or significance as applied to the goods or services. *In re The Place Inc.*, 76 USPQ2d 1467, 1470 (TTAB 2005). If the second connotation is not descriptive, and is readily apparent to the consumer, the expression may qualify as a double entendre. *See, e.g., In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1105 (TTAB 2018) (“A double entendre is registrable only if the second, non-descriptive meaning would be readily apparent to the consumer from the mark itself.”); *In re Calphalon Corp.*, 122 USPQ2d at 1163 (“Applicant apparently contends that the second proposed meaning is not descriptive.”); *In re Carlson*, 91 USPQ2d 1198, 1201 (TTAB 2009) (“The next question we must consider is whether the ZING portion of applicant’s mark creates a separate commercial impression, such that the mark as a whole has a double entendre, with one meaning that is not merely descriptive.”). The TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) sums it up: “The mark that comprises the ‘double entendre’ will not be refused registration as merely descriptive if one of its meanings is not merely descriptive in relation to the goods or services.” TMEP § 1213.05(c) (Oct. 2018).

¹⁴ Applicant’s brief, 10 TTABVUE 11.

If, on the other hand, the second meaning of the term is also descriptive of the goods or services, the applied-for mark remains merely descriptive. In *In re RiseSmart, Inc.*, 104 USPQ2d 1931 (TTAB 2012), for example, the applicant argued that its applied-for mark, TALENT ASSURANCE for personnel placement and recruitment services:

presents a double entendre in that it tells consumers that users of Applicant's personnel placement and recruitment services will be presented with capable, talented candidates. It further provides an indication of Applicant's guarantee to its customers that their staffing needs will be met because Applicant will supply the personnel, or to use the slang, the "talent."

Id. at 1934.

The Board found, however, that "to the extent it does present two meanings they are both merely descriptive of the services in that both asserted meanings refer to the customers' needs being met by the provision of the appropriate capabilities/qualities."

Id. See generally TMEP § 1213.05(c) ("If all meanings of a 'double entendre' are merely descriptive in relation to the goods, then the mark comprising the 'double entendre' must be refused registration as merely descriptive.").

Here, as in *RiseSmart*, both (or all) of the meanings asserted by Applicant refer to consumers' needs being met by its products; i.e., its homeopathic pharmaceuticals and medicated candies are designed to ease the symptoms of allergies. As the Examining Attorney puts it:

in the unlikely chance that consumers were to, instead of or in addition to, understand or think of the meaning for "EASE" when viewing the "-EEZ" portion of applicant's mark, rather than simply viewing the mark in its entirety as a novel misspelling of "ALLERGIES", the trademark examining attorney submits that such alternative meaning would still be merely

descriptive of a feature and purpose of applicant's goods because the purpose of applicant's goods are to assist in alleviating or "easing" pain or symptoms associated with allergies, or feature properties that allow children to easily ingest the medication to fight allergies.¹⁵

We agree. This is consistent with generally accepted definitions of "ease," meaning "freedom from pain or discomfort,"¹⁶ "to free from something that pains, disquiets, or burdens," or "to take away or lessen: ALLEVIATE" as in "took an aspirin to ease the pain."¹⁷ All of these defined meanings describe the function or purpose of Applicant's identified goods, "homeopathic pharmaceuticals for use in the treatment of allergy symptoms; medicated candies for the treatment of allergy symptoms." *In re Chamber of Commerce*, 102 USPQ2d at 1219.

We find, in sum, that the applied-for mark is not a double entendre.

D. Portfolio of Marks

Applicant argues that ALLERGEEZ is part of a "portfolio" of marks with an "-EEZ" suffix. Its other claimed marks are:

- LOLLEEZ in standard characters for "medicated hard candies for sore throat and cough relief" in International Class 5, Reg. No. 5413866, issued Feb. 27, 2018;¹⁸
- TUMEEZ in standard characters for "medicated candies" in Class 5, Reg. No. 6086186, issued June 23, 2020; and
- MOMEEZ CHOICE in standard characters for "Homeopathic pharmaceuticals for use in the treatment of children's ailments, namely, sore and irritated throats, constipation, stomach gas, gastric and stomach ills, seasonal allergies, temperament; Medicated candies" in Class 5, Application Serial No. 87941322,

¹⁵ Examining Attorney's brief, 12 TTABVUE 10-11.

¹⁶ Merriam-Webster.com, June 10, 2019 Response to Office Action, ex. A at 12.

¹⁷ Jan. 23, 2020 Office Action (response to request for reconsideration) at 57, 64.

¹⁸ June 10, 2019 Response to Office Action, Ex. E at 24.

filed on May 30, 2018 based on a declared intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Applicant advertises the products on its website:



ORGANIC SOOTHING POPS FOR KIDS

LET'S WORK TOGETHER AND MAKE SICK DAYS A LITTLE LESS
CRUMMY.

At Momeez™ Choice, we understand how important it is to have safe, reliable ways to soothe your little one's sick day. That's why we've created 2 great USDA certified organic remedies that are fun, effective and delicious.

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According to Applicant:

Applicant's other marks demonstrate that Applicant's ALLERGEEZ mark has a different commercial impression or connotation from that conveyed by a misspelled descriptive term. Therefore, ALLERGEEZ is used in a collection of other marks by Applicant, which suggest that the products are intended to be easily digested, ease a child's discomfort, and provide a parent with a worry-free way of coping with an unhappy child who refuses to take medicine.²⁰

There are several problems with Applicant's argument. First, "we must look to the likely consumer perception of the mark in connection with the identified goods, rather

¹⁹ MomeezChoice.com, Dec. 10, 2018 Response to Office Action Ex. C at 19.

²⁰ Applicant's brief, 10 TTABVUE 18.

than applicant's intended connotation." *UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1886 (TTAB 2011). And there is no evidence that the relevant consumers—parents of young children—would perceive Applicant's intent-to-use mark as it intends.

Second, as the Examining Attorney sagely observes, Applicant's "portfolio" argument is roughly akin to a "family of marks" claim, in which a group of marks has a common characteristic that is recognized by the purchasing public.²¹ See *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991). An applicant's mere intention and ownership of multiple marks containing the common characteristic do not suffice to establish its recognition by the purchasing public. *Am. Standard Inc. v. Scott & Fetzer Co.*, 200 USPQ 457, 461 (TTAB 1978) ("It is settled that merely adopting, using and registering a group of marks having a feature in common for similar or related goods with possibly the intent to establish a 'family of marks' identified by the common portion does not afford relief under this theory."). Owners of many more registered marks than Applicant have failed to establish a family. See, e.g., *Consolidated Foods Corp. v. Sherwood Medical Industries, Inc.*, 177 USPQ 279, 282 (TTAB 1973) (opposer owned over 45 registrations for marks with the same suffix, but the Board held that "ownership of a large number of registrations for marks containing a common prefix or suffix is insufficient, per se, to establish recognition of a 'family' of marks.") "It is thus necessary to consider the use, advertisement, and distinctiveness of the marks,

²¹ June 29, 2019 Office Action at 4.

including assessment of the contribution of the common feature to the recognition of the marks....” *J & J Snack Foods. v. McDonald’s*, 18 USPQ2d at 1891-92, *quoted in In re LC Trademarks, Inc.*, 121 USPQ2d 1197, 1203 (TTAB 2016). This Applicant has failed to do. Aside from its two recently issued registrations and its pending intent-to-use applications, it proffers no evidence of the extent to which its “-EEZ” formative marks have been used or promoted in commerce. It provides screenshots from its website, but no indication of how frequently that website has been visited. Thus, its “portfolio” argument fails to show that the public recognizes the “-EEZ” suffix as it intends.

Third, as noted, even if Applicant succeeds in showing that “-EEZ” connotes “EASE,” it merely describes a desirable characteristic, function, or purpose of Applicant’s products. *See In re Scholastic Testing Serv., Inc.*, 196 USPQ 517, 519 (TTAB 1977) (applied-for mark merely describes “a desirable characteristic or purpose of applicant’s service”). So the “portfolio” argument fails to obviate the descriptive nature of Applicant’s applied-for mark.

E. Third-Party Marks

Applicant contends that there are at least 34 active third-party marks on the Principal Register that contain a descriptive term for various goods and services, followed by the suffix “-EEZ.”²²

²² Applicant’s brief, 10 TTABVUE 14.

Mark	Reg. No.	Goods/Services
Clean-eez Cleaning Products “CLEANING PRODUCTS” Disclaimed	5875656	Class 3: Carpet cleaners; Carpet cleaners with deodorizer; Carpet cleaning preparations; Cleaner for use on floors, grouts, carpets, surfaces, and/or tiles; Cleaning agents and preparations; Cleaning preparations for floors, grouts, carpets, surfaces, and/or tiles; Cleaning, washing and polishing preparations; Floor finishing preparation; Floor stripping or cleaning preparation; General purpose cleaning, polishing, and abrasive liquids and powders; Powder cleaners for metals, ceramics and carpets
SPARK-EEZ	5897843	Class 13: fireworks, namely, sparklers
Chem-eez	5309202	Class 3: Heavy duty cleaner degreaser which is used in a wide variety of cleaning and degreasing, not for manufacturing processes
CHATEEZ	5276084	Class 16: Printed matter, namely, postcards, greeting cards, flashcards, pictures, posters, pictorial prints, and stationery
CURL-EEZ	4845771	Class 17: Plastic tubes for organizing electrical wires, fishing line, and other strands, and for use as fishing leader wraps
WHEEL-EEZ	4806497	Class 3: Automobile, tire, glass and wheel cleaning preparations
SOCK-EEZ	5159041	Class 21: NON-ELECTRIC HAND OPERATED APPARATUS FOR USE IN REMOVING A SOCK FROM A PERSON'S FOOT BY SLIDING THE APPARATUS ALONG A PERSON'S LEG BETWEEN THE SOCK AND THE SKIN SO

		THAT A HOOK PUSHES THE SOCK OFF THE FOOT
	5090000	Class 28: Toy building blocks capable of interconnection
Pup-Eez	5017704	Class 43: Boarding for animals; Pet day care services Class 45: Pet sitting
FOOD .EEZ	4933576	Class 29: Fresh meat
BACK-EEZ	4881015	Class 21: Applicators sold empty for applying cosmetic lotions for skin, back, body
click-eez	4837333	Class 14: Bracelets
 "TACO" Disclaimed	4710619	Class 30: Seasoning mixes; Seasoning pastes; Seasonings; Seasonings, namely, taco seasoning
SENSEEZ	4600924	Class 20: battery operated pillows that vibrate when squeezed or sat on
FLIPEEZ	4464030	Class 25: HEADWEAR; HATS; CAPS
Garbage-Eez	4502303	Class 21: Dispensing units, not of metal, for household purposes for dispensing garbage bags
DRAIN EEZ "DRAIN" Disclaimed	4497214	Class 11: Polypropylene fabric sleeves for encasing drain pipes to prevent penetration by small particles and soil contamination
FEVER-EEZ	3963702	Class 3: Non-medicated disposable wipes impregnated with cleansing chemicals or compounds for personal hygiene used to produce a cooling effect in relief of body heat
NOZ-EEZ	3963548	Class 3: Disposable wipes impregnated with cleansing chemicals or compounds for personal hygiene and nasal care
BOB-EEZ	4046913	Class 7: Bobbins for weaving looms
SCRATCH-EEZ	4713116	Class 8: Ticket scratchers, namely, hand tools for scratching the film off of lottery tickets
WHEEL EEZ "WHEEL" Disclaimed	3360636	Class 12: Tires

FOOT-EEZ	2895651	Class 25: Footwear
Stink-eez	3806721	Class 1: Desiccants
SWAB-EEZ	3739831	Class 21: Cleaning swabs for commercial uses
CLOTH-EEZ	2431747	Class 25: CLOTH DIAPERS
CHAFE EEZ “CHAFE” Disclaimed	2440921	Class 3: ANTI-FRICTION SKIN CREAM, NAMELY, A SKIN PROTECTANT FOR SPORTS AND MEDICAL IRRITATIONS
BENDEEZ	2484631	Class 20: stress-relief novelty items consisting primarily of plastic in the nature of bendable sticks; and bendable key chains and key rings consisting primarily of plastic
THUM-EEZ	2008502	Class 15: thumb protectors for wind musical instruments
CUSH-N-EEZ	1702571	Class 25: footwear
SKIN EEZ	1363441	Class 21: DISPOSABLE GLOVES
GRIPEEZ	5891381	Class 20: Non-metal hooks; Wall hooks of non-metal; Self-adhesive non-metal hooks; Non-metal fixtures comprising hooks for hanging general household goods
BRUSHEEZ	5197359	Class 21: Cups; Toothbrush head covers; Toothbrush holders; Toothbrushes; Toothbrushes, electric; Electric toothbrush replacement handles and recharging docks sold as a unit; Electric toothbrush replacement heads; Electric toothbrushes
SHAPEEZ	5580228	Class 25: Bras; undergarments; lingerie; body shapers

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Applicant introduced this third-party evidence “to show that the suffix ‘-EEZ’ is used by third-part[ies] as a playful and creative spelling of the phonetic equivalent term ‘EASE.’”²⁴

²³ Applicant’s brief, 10 TTABVUE 14-16; Dec. 19, 2019 Response to Office Action (request for reconsideration) at 7-56.

²⁴ Applicant’s brief, 10 TTABVUE 17.

The Examining Attorney points out that unlike ALLERGEEZ, which sounds like “ALLERGIES,” most of these third-party registered marks do not form words phonetically identical to an existing word.²⁵ “For example, the trademark examining attorney is not aware of a ‘real’ phonetic equivalent for the words ‘brusheez’, i.e., ‘brushies’, ‘gripeeze’, i.e., ‘gripies’, ‘fevereze’, i.e., ‘feveries’, ‘draineze’, i.e., ‘drainies’ or the like (to name a few).”²⁶

Applicant responds that “many of the third-party marks are phonetic equivalents of real terms, including CURL-EEZ, WHEEL-EEZ, PUP-EEZ, FOOD .EEZ, WHEEL EEZ, and FOOT-EEZ.”²⁷ It argues that:

The third-party registration evidence of “-EEZ” marks suggests that “-EEZ” is well-recognized by the public. *See Juice Generation, Inc. v. GS Enterprises LLC*, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (quoting J. Thomas McCarthy, 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:90 (4th ed. 2015) (“Third party registrations are relevant to prove that some segment of the composite marks ... has a normally understood and well-recognized descriptive or suggestive meaning....”).

Third-party registrations, standing alone, do not show the extent of use of marks in commerce, or their recognition by the public. The “existence of [third-party] registrations is not evidence of what happens in the market place or that customers are familiar with them.” *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973), *quoted in In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d*, 777 Fed. Appx. 516 (Fed. Cir. 2019).

²⁵ Examining Attorney’s brief, 12 TTABVUE 15.

²⁶ Jan. 23, 2020 Office Action (response to request for reconsideration) at 3-4, 6-29 (no dictionary definitions of these terms).

²⁷ Applicant’s brief, 10 TTABVUE 17.

They may, however, “be considered to demonstrate the meaning of a word which comprises the mark, or a portion thereof, to show that there is a well-known and commonly understood meaning of that word and that the mark has been chosen to convey that meaning.” *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991) (internal citations omitted), *quoted in Sock It To Me, Inc. v. Aiping Fan*, 2020 USPQ2d 10611 (TTAB 2020) (citing *Juice Generation*, 115 USPQ2d at 1675).

In this case, a few of the cited third-party marks, such as PUP-EEZ and FOOD .EEZ, could be regarded as phonetic equivalents of “puppies” and “foodies.” That does not show, however, that “-EEZ” would be taken as the equivalent of “EASE” in the context of the third parties’ identified goods and services. For example, “foodies” is a common term for “one who has an ardent or refined interest in food; a gourmet.”²⁸

Whatever rationale may have prompted registration in those cases, we must evaluate the evidence in the present record to determine whether the proposed ALLERGEEZ mark is eligible for registration, and are not bound by the decisions of examining attorneys in other applications. *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635, (Fed. Cir. 2016), *cited in DeVivo v. Ortiz*, 2020 USPQ2d 10153, * 9 (TTAB 2020). “In a final analysis, we are not so much concerned with what has been registered, but rather what should or should not be registered. Furthermore,

²⁸ THE AMERICAN HERITAGE DICTIONARY, AHDictionary.com 9/26/2020. “The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).” *Int’l Dairy Foods Ass’n v. Interprofession du Gruyère and Syndicat Interprofessionnel du Gruyère*, 2020 USPQ2d 10892, *17 n. 115 (TTAB 2020).

it has been consistently held that third-party registrations are not conclusive on the question of descriptiveness. Each case must stand on its own merits and a mark which is merely descriptive should not be registered merely because other such marks appear on the register.” *In re Scholastic Testing Serv., Inc.*, 196 USPQ at 519.

In this case, none of the third-party marks establish that -EEZ, as used in ALLERGEEZ, would be taken as anything other than descriptive, either as part of “ALLERGIES” or as a suffix describing “EASE”.

II. Conclusion

Applicant argues in its reply brief that “The Examining Attorney has offered no evidence suggesting that a competitor will need to use “allergeez” to describe similar products. In fact, the Examining Attorney has offered no evidence that anyone has ever used the word “ALLERGEEZ” to describe similar products.”²⁹ However, “there is no requirement that the Examining Attorney prove that others have used the mark at issue or that they need to use it, although such proof would be highly relevant to an analysis under Section 2(e)(1). The correct test is whether the phrase forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods.” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1514 (TTAB 2016).

In this case, ALLERGEEZ conveys an immediate idea of the characteristics, feature, function, and purpose of Applicant’s goods. For all the foregoing reasons, we

²⁹ Applicant’s reply brief, 13 TTABVUE 9.

find that the applied-for mark is merely descriptive of Applicant's identified goods under Section 2(e)(1). 15 U.S.C. § 1052(e)(1).

Decision: The refusal to register Applicant's mark is affirmed.